SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET ALS,
Petitioners and Plaintiffs.

versus

ARKANSAS NATURAL GAS CORPORATION,
Respondent and Defendant.

On Writ of Certiorari to United States Circuit Court of Appeals for The Fifth Circuit

SECOND SUPPLEMENTAL BRIEF OF PETITIONERS AND PLAINTIFFS

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MAY IT PLEASE THE COURT:

Respondent, Arkansas Natural Gas Corporation, has filed a supplemental brief since oral argument which contains serious misstatements of fact.

Plaintiff's affidavits (R. 83), stated that the sales there listed were *all* the sales of gas in the Richland Gas Field during the period involved in this proceeding (1927 to March 20, 1930), except two sales claimed by defendant's witness Florsheim which plaintiff disputed for reasons stated (R. 36, 47). We showed that these were all sales under pipe line contracts except a trivial sale of drilling gas in 1927 (R. 36, 39, Par. 14) (Stipulation of Facts, R. 69 to 79).

Respondent's brief, at page 4, states that there are other contracts in evidence. The brief fails to state that these were all after March 20, 1930, the period involved in this suit. It is true that after March 20, 1930, several sales were made at 3c or at 2½c, but these were during the period of time in which the jury found the market price, despite these sales, to be 4.45c which is res adjudicata.

Plaintiffs' affidavit was prepared with care, and no other sales will be found anywhere in the record during the period involved in this hearing.

Respondent's brief criticizes the fact that counsel for plaintiff made affidavit. No lawyer likes to make affidavits in his own case, but the hard necessities of summary judgment left no alternative, because plaintiffs could not procure gas experts. This affidavit merely testifies to the contents of the record in this suit, which is certainly a fit subject for lawyer affidavit.

COURT OF APPEALS DECISION HERE UNDER REVIEW

With reference to the questions raised in oral argument regarding the decision of the Court of Appeals here under review (R. 105-110), that Court states the legal basis for its decision as follows:

> (R. 107): "In the meantime, this Court, in Sartor v. United Gas Public Service Co., 84 Fed. (2) 436, again holding as it had held in Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924, that the pipe line contracts were not admissible to prove market price, and that plaintiffs were entitled to receive for the gas, not the pipe line prices, but the market price at the well, laid down the rule that the object and purpose of the inquiry in a case of this kind is to determine (1) the market price at the well, or (2), if there is no market price at the well for the gas, what it is actually worth there.
>
> (R. 108): Subsequent to the decision in this case (In Supreme Court of Louisiana), there were three other gas recovery cases decided in this Court. Pardue v. Union Producing Co., 117 Fed. (2) 225; Driskell v. Union Producing Co., 117 Fed. (2) 229, Hemler v. Hope Producing Co., 117 Fed. (2) 231. In all of these cases, the rules heretofore stated were reaffirmed, and though in the Pardue case it was declared that the proof defendant had made of a few sales at the wells was not sufficient to establish a market prices there for the whole period of the suit, the court reaffirmed the principle that if the evidence had established such a market price, resort to the pipe line contracts and other such testimony to estab-

lish the value of the gas could not have been admissible."

Thus it will be seen that the Court of Appeals, in the decision here under review bases its decision on two findings of law:

1. The pipe line contracts (which are all of the sales of gas during the period involved in this suit, except a trivial sales in 1927), are not admissible in evidence to prove market price.

2. Plaintiffs, and all land-owners, are entitled, not to the market price in the field where the gas is produced, but to the market price at the well where produced, or if there were no sales at the well, then to its value there.

These holdings seem, on their face, to be contrary to reason and logic. What reasons does the Court of Appeals give for these holdings of law?

In the case here under review, the sole reason given is that the Court has so decided in two previous cases, stare decisis.

Turning to those two cases for explanation, let us see what they said on the first point, that the pipe line contracts are not admissible in evidence.

The first of these cases is the appeal taken in the case now at bar from the first jury verdict in favor of plaintiffs, decided by the Court of Appeals in 1935, in *Arkansas Natural Gas Co. v. Sartor, 78 Fed. (2) 924.* In that case, the Court of Appeals said *(78 Fed. (2) 927):*

"As applied to this case, the term "market price" is interchangeable with the term "market value". In the nature of things there could be no open market for natural gas. It is admitted that there are no exchange quotations or other evidence to be obtained of open and notorious market prices at which any one desiring gas could purchase it, as would be available in the sale of other commodities. In this situation, the modern rule is that value may be shown by evidence of other sales, provided the conditions are substantially similar (Citing cases). Other sales may be shown by verbal testimony, as well as by documentary evidence. In fact, oral evidence is, in many cases, preferable since, if nothing but the deed is produced, there is no opportunity to cross-examine the parties to the sale to determine whether the price is fair. Jones, Evidence Civil Cases. Sec. 168.

It is also well settled that value may be shown by the opinion of any competent person having knowledge of the facts, whether an expert or an ordinary witness. In Montana Ry. Co. v. Warren, 137 U. S. 348, 353 it was said: "At best, evidence of value is largely a matter of opinion". (Citing other authorities).

We respectfully suggest that the Court of Appeals here went astray by overlooking the difference between finding the market price of a commodity, like gas, and a tract of land. In the case of commodities, the actual commodity is sold, and the price is proved by the sales; in the case of land, the inquiry is about the market value of a tract of land which has not been sold, hence the only way to find the value is for experts to testify regarding sales of other lands.

Continuing in this same decision, we get down to what the Court said about the pipe line contracts being inadmissible in evidence, as follows: *(78 Fed. (2) 928)*:

> "Applying these rules, it is apparent that the contracts offered by plaintiff were inadmissible. The facts that delivery was made at pipe lines instead of the well, and that the prices shown were for gas at a pressure of 8 ounces, instead of 2 pounds, would not be serious objections, if that were all. Under the stipulations in the record above set out, the jury could have ascertained the value of the gas at the well by a simple calculation. However, this is not true as to the other features of the contracts offered. In this case, the lessors were under no obligation to deliver any gas at all nor to guarantee that the land would produce any definite quantity annually or over a period of time. In fact, as production was declining, they were not in a position to do so. The undisputed testimony supports the conclusion that the guaranty to deliver large amounts of gas formed part of the consideration for the prices paid, in the contracts that were admitted. There was no possible way the jury could determine accurately how much this amounted to, and it was not within their province to guess at it."

Ever since this decision was rendered in 1935, we have tried to understand it, without success. What have the lessors to do with the market price of gas? They are farmers who leased their land to defendant for gas production, and have nothing to do with the production or marketing of it. Why does the fact that these pipe line contracts are sales of large quantities of gas make them inadmissible in evidence? It would seem that large sales

would be better evidence of market price of gas, than small sales.

We have repeatedly inquired of the Courts, have repeatedly challenged opposing counsel, who provoked the ruling, to explain it. Neither the Courts nor opposing counsel have ever even remotely mentioned the verbiage of this decision, or attempted to explain it. In our petition to this Court for writ, we stated that the opinion seemed unintelligible, but respondent has never mentioned it.

The second case cited by the Court of Appeals, in the decision here under review, as settling the law that the pipe line contracts are not admissible in evidence, is *Sartor v. United Gas Public Service Co., 84 Fed. (2) 436*, decided by this same Court of Appeals in 1936, on issues identical with those here at bar.

In this second case, the Court affirmed the rule that pipe line contracts were not admissible in evidence, holding it to be stare decisis under the previous decision above quoted, and that all discussion was foreclosed the Court refusing to reconsider the holding. However, the Court held that gas company officials who negotiated these pipe line contracts might be called on to state what the prices were. Having a witness testify orally to the contents of available written documents seems to violate elementary rules of evidence. The Court did not explain this. The Court of Appeals in this case originated a new viewpoint of these pipeline contracts of sale, saying: *(84 Fed. (2) 440)*:

"On another trial, the jury should therefore be carefully instructed, among other things, that the prices the producer is obtaining for gas under his pipe line contracts are not true daily market prices. They are the prices paid under long-term contracts, entered into years before, and therefor have a bearing on the issue to be tried, not as representing fixed daily market prices, but merely to aid in arriving at a conclusion as to the fair value at the well, from day to day, of the gas taken from plaintiffs' well.

In determining market price, or value, a mere matter of opinion in a case like this, fixed and rigid rules do not govern. The object and purpose of the inquiry in this case is to determine; (1), if it can be done, the daily market price at the well, or at the nearest market, less the cost of getting it there. (2) If there is no daily market price, the object is to determine what the gas is actually worth at the well."

Needless to say, a land-owner could not produce the evidence required by the Court of Appeals, hence this jurisprudence practically bars a landowner from suing an expert gas company on a lease.

The idea that a day-by-day market must be proved, was originated by the Court. It was never suggested by any of the parties or witnesses. The Court of Appeals seems obviously in error, because the fact that natural gas can be marketed only through pipe lines on long term contracts, makes a day-by-day market entirely impossible. The Court errs in applying to natural gas the same rules as to stock market securities.

We respectfully submit that this shows the inherent difficulty of the Court of Appeals. The Court overlooked the fact that the market price of any commodity is, as said by this Court in the case of *Muser v. Magone, 155 U. S. 240, 249:*

> "Such prices as dealers in the goods are willing to receive and purchasers are made to pay, when the goods are bought and sold *in the ordinary course of trade.*" (Italics ours)

The Court of Appeals overlooks the fact that *the ordinary course of trade* for natural gas is long term sales of pipe lines: exactly the sales shown in the case at bar.

This is inherent in the nature of natural gas. It cannot be transported to market by railroad cars or trucks on highways. It can be marketed only by pipe lines. Pipe lines are expensive, and will not be built until the builder has a contract with a gas producer to furnish gas over a long enough time to repay the cost of the pipeline with a profit. Gas can be marketed in no other way; and every sale produced in this case, with one or two trivial exceptions, is based on that course of trade. Hence, these long-term pipe line sales are what fixes the market price of gas. The parties to the lease could not have contemplated any other market.

It will be thus seen that the revolutionary and apparently impossible ruling of the Court of Appeals—that in determining the market price of gas, all the actual sales of gas are inadmissible in evidence—rests on only one crytic, unexplained sentence in a decision in 1935 which the Court has refused to reconsider or explain since.

The second ruling of law made by the Court of Appeals in the decision here under review, namely, that plaintiffs are entitled not to the market price in the field where the gas is produced, but to the market price at the well, is equally unexplained by the Court.

In the above cited case of *Sartor v. United Gas Public Service Co., 84 Fed. (2) 440*, the Court of Appeal said:

> "We agree with the District Judge in the view he took in the Arkansas Natural Gas case and in this, that plaintiffs were entitled to receive for the gas the market price at the well, and not the market price in the field."

This is an arbitrary dictum by the Court of Appeals, for which the Court has never given any explanation, in any case.

As we have shown in our previous brief, there cannot be two market prices for gas in the little area constituting a gas field. Hence the market price in the field, and the market price at each well in the field must be the same.

The Supreme Court of Louisiana has expressly so decided in the case of *Sartor v. United Carbon Co., 183 La., 287, 163 So. Rep. 103*, in which that court had under review a lease similar to the lease at bar, and said:

> "This Court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced."

Hence when the Court of Appeals, in the decision here under review, repeats frequently and bases its decision on the statement that the market price at the well, not the market price in the field, must be proved, the Court is making an arbitrary dictum not explained by any reason or logic stated by the Court, and contrary to the jurisprudence of the Supreme Court of Louisiana.

We might mention also that both of these rulings of law by the Court of Appeals are contrary to the admissions of both parties in their pleadings.

Plaintiff, in his petition or complaint said (R. 3, paragraph 7):

> "No open market, or public bidding, and no published prices have ever existed for natural gas in the State of Louisiana, hence its value and market price, to which petitioners are entitled under said contract (of lease), could be ascertained only from sales made by defendant and other producers . . ."

Defendant answered this as follows (R. 13, paragraph 7):

> "It is admitted, however, that there has never been any public bidding or published prices for natural gas in Louisiana, it not being the custom to establish prices for natural gas in that manner; but defendant avers that the value of the gas produced from the lease described in paragraph one of plaintiffs' petition based on *the generally recognized fair market price* for natural gas in the Richland field was three cents (3c) per thousand cubic feet, computed at two pounds above

atmospheric pressure, *this being the price at which the pipe line companies, which bought the bulk of the gas from the producers, were accustomed to pay, to the producers throughout the field.*" (Italics ours).

Thus defendant in its pleadings admits that the market price is fixed by the pipe line sales, and that the sales throughout the field fix the price. Possibly this explains why the able counsel for respondent, who is skilled in all natural gas matters, has never attempted to explain or defend or even refer to these rulings of the Court of Appeals.

To complete the jurisprudence of the Court of Appeals, we call attention to the appeal taken in this same case now at bar, from the verdict of the second jury, to the Court of Appeals. The Court of Appeals decided this in *Arkansas Natural Gas Co. v. Sartor, 98 Fed. (2) 527.* On this appeal, the Court had before it substantially the same record and evidence as in the first appeal quoted at length hereinabove (R. 43). Yet the Court affirmed the jury verdict, without explanation.

Conclusion

We respectfully suggest that this jurisprudence of the Court of Appeals in the case under review is clearly erroneous.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioners and Plaintiffs.

BRIEF FOR RESPONDENT

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL., PETITIONERS,

vs.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT

H. C. WALKER, JR.,
LEON O'QUIN,
ARTHUR O'QUIN
ELIAS GOLDSTEIN,
Attorneys for Respondent.

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW:

Sartor v. Arkansas Natural Gas Corporation, 46 Fed. Sup. 111;
Sartor v. Arkansas Natural Gas Corporation, 134 Fed. (2d) 433.

TABLE OF CASES:

STATEMENT OF THE CASE.

As originally projected, this was a suit by some of the lessors under a Louisiana oil, gas and mineral lease to compel the lessee to pay them for their one-eighth of the gas produced from the lease a price greater than 3¢ per thousand cubic feet. The price stipulated in the lease was "market price", which in Louisiana has been uniformly held to be market price at the well where the oil or gas is produced.

Originally the claim of petitioners related to gas produced during the years 1927 to 1932, inclusive; but after four trials in the district court and four adjudications by the Court of Appeals for the Fifth Circuit, all issues were eliminated except the one issue of the market price of gas at the well in the Richland Parish Field during the period beginning with the year 1927 and ending March 19th, 1930. The respondent, believing that no reasonable basis existed for dispute as to the market price of gas at the well in the Richland Field during this period, filed a motion for summary judgment in its favor (**R. 28**), averring that during this early period there was a market at the well for gas, which market was 3¢ per MCF calculated at two pounds above atmospheric pressure.

In support of this assertion the respondent further averred:

(a) That of the oil and gas leases in the Richland Field more than ninety per cent thereof stipulated a price as between the lessor and lessee of 3¢ per MCF and that in practically all cases where any higher price had been paid for royalty gas such higher price was the result of a compromise between lessor and lessee as to the continued existence of the lease;

(b) That substantially all of the gas that was sold by independent operators and well owners in the Richland Field during this period was sold at 3¢ or less and respondent named in the motion a number of independent operators who had made such sales;

(c) That at all times during this period there had been maintained an open market for gas at the well in the Richland Field at the price of 3¢ per MCF; and

(d) That the Richland Field was only a few miles distant from the much larger and more important Monroe Field which was producing large quantities of gas before the Richland Field was brought in; that the price of gas in the Richland Field was largely determined by the price of gas in the Monroe Field and that there had been for years an established wellside price for gas in the Monroe Field of 3¢ per MCF, which was generally recognized to be the prevailing and settled market price of gas at the well in both the Monroe and Richland Fields;

(e) That in a suit brought by these very petitioners entitled "Mrs. Janie May Sartor, et al. v. United Gas Public Service Company", 186 La. 555, 173 So. 193, the Supreme Court of Louisiana had decided that the market price at the well in the Richland Parish Field did not at any time exceed 3¢ per MCF; and

(f) That the bulletins issued by the United States Department of Commerce, Bureau of Mines, dealing with natural gas during the years 1927, 1938, 1939 and 1930 showed that the average prevailing wellhead price of gas in the State of Louisiana for this period and each part thereof was 3¢ per MCF or less.

Respondent attached to its motion the affidavits of persons of the highest credibility and the most comprehensive information concerning the production of gas from the Richland Field during the period referred to and the maintenance of a wellhead market in that field and the established price at the well in that field, all of which affidavits supported the averments of the motion.

The petitioners (respondents in rule) opposed the motion by asserting that "summary judgment in this case is absolutely impossible" principally because it had been decided in prior stages of this proceeding that the market price of gas during years subsequent to the period of interest here exceeded 3¢ per MCF; and the petitioners especially pleaded as res judicata the verdict of the jury on October 14th, 1937. The only evidence (if it may properly be called evidence) offered by petitioners on the trial of the rule was the affidavit of Mr. Gilbert P. Bullis, the attorney for petitioners, who without having had—in so far as the Record discloses—any experience in the gas

business itself, classified himself as an expert because of his having conducted ten trials on the issue of the market price of gas in the Richland Parish Field. This affidavit, **in so far as it purported to state facts,** related to certain pipe line contracts which were under the settled Louisiana jurisprudence inadmissible in evidence to prove the market price of gas in the Richland Field during the period prior to March 19th, 1930 because during that period there was an open market in which arms-length sales of gas at the well were made.

The district judge in a short opinion (**R. 86 to 88, incl.**) held that the evidence submitted shows that there was a market at the well and that the market price was 3¢ per MCF; and he held in effect that the affidavit of Mr. Bullis was not sufficient to raise a substantial issue of fact. He therefore sustained the motion for summary judgment and rejected petitioners' demands for additional royalty payments on gas produced during the period referred to.

The conclusion of the district judge as to the valueless character as evidence of the affidavit of the counsel for plaintiffs was concurred in by the Court of Appeals (**R. 104-110**), both courts holding that the affidavits in support of the motion conclusively showed that the market price of gas at the well during the period in question here did not exceed the price of 3¢ per MCF, which the respondent paid the petitioners. Both courts concurred in holding that the evidence offered in behalf of petitioners (the affidavit of their counsel) was in effect no evidence at all.

Certiorari was granted by this Court upon a petition in which the abuse of the power of the court to grant a summary judgment under Rule 56 of the Rules of Federal Procedure is asserted as one error and failure to conform to local law is named as the other.

SUMMARY OF ARGUMENT

1. The Supreme Court of the United States will consider on certiorari only those issues tendered by the petition for the writ.

Green County v. Thomas,
211 U. S. 598, 29 S. Ct. 168, 53 L. Ed. 343;
Alice State Bank v. Houston Pasture Company,
247 U. S. 240, 38 S. Ct. 496, 62 L. Ed. 1096;
Johnson v. Manhattan Railway Company,
289 U. S. 479, 53 S. Ct. 721, 77 L. Ed. 1331;
Helvering v. Taylor,
293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623,
Washington, Virginia & Maryland Coach Company v. National Labor Relations Board,
301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965;
Crown Cork & Seal Company v. Ferdinand Gutmann Company,
304 U. S. 159, 58 S. Ct. 842, 82 L. Ed. 1265;
General Talking Pictures Corporation v. Western Electric Company,
304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273;
Rorick v. Devon Syndicate,
307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303;
Dickinson Industrial Site v. Cowan,
309 U. S. 382, 60 S. Ct. 595, 84 L. Ed. 819.

2. In so far as affidavits filed in opposition to a motion for summary judgment are founded on hearsay or contain evidence which would not be admissible if a trial were had or are made by a person not having personal knowledge of the facts or by a person not affirmatively shown to be competent to testify as to the matters to which the affidavit relates, they may not be considered by the court.

Rule 56 (e) Federal Rules of Civil Procedure.

3. Rule 56 of the Federal Rules of Civil Procedure is a means to the desirable end of determining in a particular case whether or not there is a substantial issue of fact; and its proper application does not unconstitutionally deprive the party against whom the summary judgment is rendered of the right to a jury trial.

Moore's Federal Practice Under the New Federal Rules, Volume 3, page 3174;
Fidelity & Deposit Company of Maryland v. United States of America to the Use of Lewis E. Smoot, 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194;
In the Matter of Walter Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919;
Port of Palm Beach District v. Goethals, 104 Fed. (2d) 706;
Rosenblum v. Dingfelder, 111 Fed. (2d) 406;
Heart of America Lumber Company v. Belove, 111 Fed. (2d) 535;
Banco De Espana v. Federal Reserve Bank, 114 Fed. (2d) 438;
Cohen v. Eleven West 42nd Street, Inc., 115 Fed. (2d) 531;
Bushwick Decatur Motors, Inc. v. Ford Motor Company, 116 Fed. (2d) 675;
Board of Public Instruction for County of Hernando, Florida v. Meredith, 119 Fed. (2d) 712;
Fletcher v. Krise, 120 Fed. (2d) 809;
Altman v. Curtis-Wright Corporation, 124 Fed. (2d) 177;
Battista v. Horton, Myers & Raymond, 128 Fed. (2d) 29;
Sedgwick v. National Savings & Trust Company, 130 Fed. (2d) 440;
Toebelman v. Missouri Kansas Pipe Line Company, 130 Fed. (2d) 1016;
Beall v. Pinckney, 132 Fed. (2d) 924;
Fishman v. Teter, 133 Fed. (2d) 222;
Piantadosi v. Loew's Inc., 137 Fed. (2d) 534;
Pen-Ken Oil & Gas Corporation v. Warfield Natural Gas Company, 137 Fed. (2d) 871;

4. The decision of both of the lower courts here is in full accord with the established jurisprudence of Louisiana.

Sartor vs Arkansas Natural Gas Corporation,
46 Fed. Sup. 111;
Sartor vs Arkansas Natural Gas Corporation,
134 Fed. (2d) 433;
Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

5. "Market Price" in Louisiana is the same thing as "market value". Both terms when applied to natural gas produced from Louisiana lands mean the market price generally paid at the well or in the field where the gas is produced.

Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

6. Where the existence during a particular period of time of an actual market at the well or in the field for natural gas produced from Louisiana lands is shown, evidence as to prices paid for gas under long term pipeline contracts with unusual and onerous obligations on the sellers is not admissible to show the market price or market value of the gas.

Wall v. United Gas Public Service Company,
178 La. 907, 152 So. 561;
Sartor v. United Carbon Co.,
183 La. 287, 163 So. 103;
Sartor v. United Gas Public Service Company,
186 La. 555, 173 So. 103.

ARGUMENT.

MAY IT PLEASE THE COURT:

Since one man cannot generally see into the mind of another, we have no way of knowing what induced this Court to consent to review the judgment of the Court of Appeals in this case; and we are, therefore, forced to assume that the issues tendered in the petition for certiorari and the brief supporting it are those in which this Court is interested.

This assumption is fortified by the prior jurisprudence of this Court to the effect that only those issues tendered by the petitioner for certiorari will be considered.

Green County v. Thomas,
211 U. S. 598, 29 S. Ct. 168, 53 L. Ed. 343;
Alice State Bank v. Houston Pasture Company,
247 U. S. 240, 38 S. Ct. 496, 62 L. Ed. 1096;
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Rorick v. Devon Syndicate,
307 U. S. 299, 59 S. Ct. 877, 83 L. Ed. 1303;
Dickinson Industrial Site v. Cowan,
309 U. S. 382, 60 S. Ct. 595, 84 L. Ed. 819.

We come, therefore, immediately to consideration of the first assignment of error.

In the petition for certiorari the question raised with regard to the use of summary process is subdivided into six parts, which we quote.

"(1-a). May a District Court deprive a litigant of trial by jury, by granting summary judgment, when the evidence is conflicting, and summary judgment requires the determination of controverted facts and the weight, sufficiency and effect of evidence?

"(1-b). May the **opinions** of witnesses testifying by affidavit be used as a basis for summary judgment, or must the testimony be on facts only?

"(1-c). Is a litigant deprived of due process of law, when hostile witnesses testify to their opinions by affidavit, and the litigant is deprived by the practice in summary judgment, of the right to cross-examine these hostile witnesses as to their qualifications as experts, and the basis of their opinions.

"(1-d). When two juries have decided all the facts in a case in favor of plaintiff, in previous trials, may summary judgment be rendered in favor of defendant on the same facts?

"(1-e). The rule states that 'pleadings, depositions and admissions on file' shall be used on trial for summary judgment. Does this include documents filed in a previous trial of the same case?

"(1-f). May the affidavits of witnesses state the contents of written documents not in evidence?"

Of these parts, question (1-b) may be summarily disposed of by pointing out that the affidavits submitted in support of the motion for a summary judgment were the sworn statements of men who as the result of their long experience in the gas business, which experience included the making of innumerable sales, among them being sales of gas from the Richland Field itself, were informed in the highest degree regarding the market price of gas in that and other fields and who predicated their conclusions upon sales of gas from wells in the Richland Field in which they either participated or of which they had personal knowledge.

Likewise, (1-d) may be given short shrift by pointing out that of the two jury verdicts one was set aside by the

Court of Appeals and the other dealt only with the question of the market price of gas during a period subsequent to that involved here.

(1-e) is without bearing on the decision of this case. It doubtless refers to the refusal of the district court to include in the transcript of appeal condensation of certain pipe line contracts which had not been offered in evidence by either party on the trial of the motion for summary judgment. (See **Bill of Exceptions, R. 95 to 100.**) The district judge, however, permitted this condensation to be made a part of the Bill of Exceptions; and it was printed as a part of the Record. Both the district court and the Court of Appeals held that evidence as to the prices paid under these pipe line contracts was irrelevant and inadmissible because of the clear proof of the existence of a market at the well in the field and of a market price of not more than 3¢ per MCF in that market during the period beginning with the year 1927 and ending March 19th, 1930.

We do not know to what (1-f) is intended to relate; but it should suffice to point out that the affidavits of the witnesses for respondent were considered by both courts adequate to prove the facts of the existence of the market at the well in the field during the period referred to; and we take it that where the lower courts have concurred in a finding of fact, this Court will not undertake to review the evidence and determine if it would have made a similar finding on the same evidence.

This brings us to a discussion of parts (1-a) and (1-c), which are so closely related that they should be considered together.

Except for the legal and constitutional question as to the power of the district court to "deprive a litigant of trial by jury by granting summary judgment", part (1-a) is wholly inapplicable to the state of facts shown to exist in this case. There is no conflicting evidence; for all of the evidence which was relevant and material and competent is embraced in the affidavits supporting the motion for summary judgment.

Rule 56 of the Rules of Civil Procedure, which were prescribed for district courts by this Court and which this Court at the time at least doubtless considered it had the power to adopt, declares:

"Summary Judgment.

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

"(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"(g) Affidavit Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

It will be noted that paragraph (e) of the rule requires both supporting and opposing affidavits to be made from personal knowledge, to set forth such facts as would be admissible in evidence, and to show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavits supporting the motion for summary

judgment meet these requirements in every particular; but tested by any one of these three requirements the affidavit of the learned counsel for the petitioners is found defective. It is not sufficient for a witness to say that he is competent to testify as to market price; it is essential that such competency should appear by proof of the source of his information. Here that source was the statements of witnesses made in prior trials. If there had been a trial of this case and counsel for petitioners had attempted to summarize the testimony on the point given by witnesses in prior trials, an objection to the hearsay character of the testimony must necessarily have been sustained. One does not become an expert or informed witness qualified to testify concerning sales of gas over a particular period by reason of trying lawsuits and hearing witnesses testify in relation to sales of gas.

Moreover, as said by the learned district judge in his opinion (**R. 87**):

> "Nothing was offered by the plaintiffs to dispute this proof except the affidavit of their counsel, which patently deals with the pipe line prices. Evidence as to pipe line prices, as has been held by both this court and the Court of Appeals, was admissible only if there was no market at the well, and it appearing from the showing made here without contradiction that there was such a price at the well, the necessity for considering the pipe line contracts or prices and the elements affecting them does not arise in this case."

In its opinion (**R. 109**) the Court of Appeals after declaring the established law in Louisiana, both in the state and federal courts, to be that where a market price at the well exists in a particular field, prices paid by pipe lines for gas delivered at points outside of the field are irrelevant, said in part:

> "The decisions, state and federal, standing thus, the defendant filed its motion in this cause for summary judgment. Averring in it that for the years in question remaining in the suit, there was a prevailing market price of 3 cents or less at the well and there

was, and could be, no genuine issue of fact to the contrary for trial to a jury, it supported the motion by numerous affidavits to that effect. Plaintiffs, insisting that in former trials of this case a jury had found for plaintiff a market value in excess of 3 cents, and arguing as they have consistently done, exactly contrary to the decisions of this and the state court, supra, that the pipe line contracts were evidence of, and determined, this market value to be more than 3 cents, offered neither affidavit nor proof of any kind rebutting the effect of the affidavits filed in support of defendant's motion that, as to the years in question in this suit, there was a market value at the well of 3 cents, and, therefore resort to proof of actual value was neither necessary nor proper. The district judge, holding, that under the law, as established by Federal and state decisions, evidence of pipe line prices was inadmissible if the evidence showed that there was a market price at the well, and that it appeared without contradiction that there was such a price, granted the motion for summary judgment and entered judgment accordingly. We think it clear that in so doing, he was right. We have written often on the nature and effect of Rule 56, the rule for summary judgment. Our views, as there expressed, leave in no doubt that the summary judgment rule is a salutary one for the purpose of avoiding unnecessary trials, that is, trials where there is nothing of fact to be tried. They leave in no doubt too that on such a motion it is the duty of counsel for plaintiff and defendant to fully disclose what the evidence will be on the issues raised by the motion, and of the district judge to proceed on the disclosures thus made. If on such disclosures, it appears that only one verdict could be rendered, that is, that there is no disputed issue of fact, it is then the duty of the judge to enter judgment in accordance with the showing made. It will serve no useful purpose to enter into an analysis of the supporting proofs offered by the movant. It is sufficient to say that they established without contradiction or question of any kind that in the early years of the field involved in this suit, there was a market price for the gas at the well, and that that market price was never at any time during any of the years in

question in excess of the 3 cents which defendant consistently paid plaintiffs. If, on a trial to a jury, the evidence would show this, it would be the duty of the judge to direct a verdict for defendant. It was his duty, therefore, on the motion for summary judgment to bring the matter to a close by entering judgment on the motion."

An excellent statement of the test of merit of an affdavit in support of a summary judgment is found in the opinion of the Court of Appeals for the Second Circuit in the case of **Banco De Espana v. Federal Reserve Bank, 114 Fed. (2d) 438 (445).**

"A bona fide affidavit to support a summary judgment must necessarily be a statement of the facts which the moving party knows and is able to substantiate at the trial.

"An affidavit of expert opinion has been held admissible only when made by an affiant with the necessary expert qualifications, Gloeser v. Moore, 284 Mich. 106, 278 N. W. 781; Baxter v. Szucs, 248 Mich. 672, 227 N. W. 666, and an affidavit containing inadmissible hearsay statements has been considered incompetent to the extent of the hearsay. Shea v. Leonis, 29 Cal. App. 2d 184, 84 P. 2d 277; Rosenthal v. Halsband, 51 R. I. 119, 152 A. 320. These rulings but serve to show that the courts look through the form to the substance of the matter presented, and that the real requirement is of proof which if presented at a formal trial would be competent to support the issues to which it is directed. When such proof is found in an affidavit presented in support of a motion for summary judgment, it should be considered even though the affidavit does not contain the then pointless offer of the affiant to submit to a cross-examination which will not be required if the affidavit is acceptable. Any other result would be as stultifying to this desirable summary procedure, as if we were to require the production of all witnesses at the hearing on the motion for the summary judgment as an earnest of their willingness to appear at a later trial."

(114 Fed. (2d) 445.)

We have not found a better statement of the function and history of the rule and the reasons for it than that of Professor James W. Moore in the scholarly work entitled **Moore's Federal Practice Under the New Federal Rules.** In **Volume 3, page 3174,** it is said:

"Function.

"The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such an issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to defeat in whole or in part the recovery of a just claim. 'The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from which is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.' [1] To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried. The court is authorized to examine evidence, not for the purpose of trying an issue, but to determine whether there is a genuine issue of fact proper for trial. If there is no genuine issue of fact in controversy, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts may render a summary judgment. If there is a genuine issue as to a material fact, the case will go to trial. In this latter situation, however, Rule 56 (d) imposes a duty upon the court to sift the issues and to specify which material facts are really in issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting of the issues upon a motion for summary judgment, as provided in Rule 56 (d), is quite

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Note 1: Per Judge, later Justice, Cardozo in Richard v. Credit Suisse (1926) 242 N. Y. 346, 152 N. E. 110.

similar to the pre-trial procedure provided in Rule 16, except that under Rule 56 (d) it is compulsory, while under Rule 16 it is discretionary with the court.

"History.

"A species of the summary judgment procedures was adopted at an early date by at least one American colony, and after the separation from England, in a few of the states. While this early development of summary procedure in America is an interesting incident in American legal history, it was not of great significance and, in fact, the procedure disappeared with the adoption of the codes in the few states in which it had been in operation. The summary judgment procedure as we know it today was first adopted in England in 1855. It was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise to marry. The procedure was adopted in New York in 1921 for a limited class of actions, but was extended in 1933 to include so many classes of actions that it has been suggested that all restrictions be removed and that the remedy be available in any action. New Jersey, Connecticut, Wisconsin, Michigan, Illinois, California and a number of other states have also adopted some form of summary judgment procedure.

"The rule has operated successfully in all the jurisdictions in which it has been adopted and the tendency has been to enlarge the scope of its operation. The draftsmen of the Federal Rules took cognizance of this tendency to enlarge the scope of the summary judgment procedure. * * *

"Constitutionality; Right to Jury Trial; Summary Judgment in the Federal Courts.

"The Court of Appeals of New York has sustained the constitutionality of the summary judgment pro-

cedure, holding that it did not infringe the constitutional right of a party to a jury trial. [13] In disposing of the defendant's contention that he was deprived of his rights to a trial by jury, the court said:

"The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."

(pp. 3174, 3175, 3176, 3177, 3178.)

More than forty years ago this Court in the case of **Fidelity & Deposit Company of Maryland v. United States of America to the Use of Lewis E. Smoot, 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194,** sustained as against an attack on the ground that it unconstitutionally deprived the petitioner of the right to trial by jury a rule of the Supreme Court of the District of Columbia which in substance was a rule for summary judgment much the same as is being here considered. Mr. Justice McKenna was the organ of the Court; and in the course of his opinion said:

"There is but one element in this contention,—the right of a jury trial. In passing upon it we do not think it necessary to follow the details of counsel's elaborate argument. In Smoot v. Rittenhouse (27 Wash. L. Rep. 741) the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff

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Note 13: General Investment Co. v. Interborough Rapid Transit Co. (1923) 235 N. Y. 133; 139 N. E. 216.

in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

"Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial. And the case at bar illustrates this. It certainly does not seem unreasonable to charge one who has become responsible for the performance of an act by another with knowledge of that act or with means of ascertaining it, so as to state a defense within the liable interpretation of the rule declared by the court of appeals.

"As early as 1879 the supreme court of the District recited the history of the rule, and explained its purpose. 'It is a rule,' the court said, 'to prevent vexatious delays in the maturing of a judgment where there is no defense.'"

(47 L. Ed. 197, 198.)

Eighteen years later in the case entitled **In the Matter of Walter Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919,** this Court through Mr. Justice Brandeis more or less laid the foundation for the present Rule 56 by sustaining an order of the Honorable Augustus N. Hand, Judge of the District Court for the Southern District of New York,

"Upon motion of defendant, and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. 625):

"With instructions 'to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the office of the clerk of this court with a view to simplifying the issues for the jury; but not finally to determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial; and the auditor to have power to

compel the attendance of, and administer the oaths to witnesses; the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge.'

"The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute, and, also, to set forth the detailed facts on which the specific claims made were rested; but the auditor was also thereby required to express his opinion on disputed issues, thus:

"'The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"'His opinion as to the net amount due on each invoice of coal sold and delivered to defendant.'"

(64 L. Ed. 921, 922.)

In the cited case as here, it was contended that the power granted to the auditor to resolve questions of fact and to give his opinion thereon violated the constitutional right of trial by jury; but the contention was summarily rejected.

"The command of the 7th Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768. Compare Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new

rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

(67 L. Ed. 923, 924.)

The extent to which the rule was needed for the facilitation of judicial procedure is shown by the instant favor with which it has been received by the lower federal courts and the large number of cases in which its use has been approved by the courts of appeals of practically every circuit. The district court decisions of this character are too numerous even for a selection to be made; but among the scores of Court of Appeals decisions the practical application of the rule is well illustrated by

Port of Palm Beach District v. Goethals,
104 Fed. (2d) 706;
Rosenblum v. Dingfelder,
111 Fed. (2d) 406;
Heart of America Lumber Company v. Belove,
111 Fed. (2d) 535;
Banco De Espana v. Federal Reserve Bank,
114 Fed. (2d) 438;
Cohen v. Eleven West 42nd Street, Inc.,
115 Fed. (2d) 531;
Bushwick-Decatur Motors, Inc. v. Ford Motor Company,
116 Fed. (2d) 675;
Board of Public Instruction for County of Hernando, Florida v. Meredith,
119 Fed. (2d) 712;
Fletcher v. Krise,
120 Fed. (2d) 809;
Altman v. Curtis-Wright Corporation,
124 Fed. (2d) 177;
Battista v. Horton, Myers & Raymond,
128 Fed. (2d) 29;

Sedgwick v. National Savings & Trust Company,
130 Fed. (2d) 440;
Toebelman v. Missouri-Kansas Pipe Line Company,
130 Fed. (2d) 1016;
Beall v. Pinckney,
132 Fed. (2d) 924;
Fishman v. Teter,
133 Fed. (2d) 222;
Piantadosi v. Loew's, Inc.,
137 Fed. (2d) 534;
Pen-Ken Oil & Gas Corporation v. Warfield Natural Gas Company,
137 Fed. (2d) 871;

In **Cohen v. Eleven West 42nd Street, Inc., supra,** appears a brief statement of the working of the rule which is more or less typical of what the federal courts have generally held.

> "A motion for summary judgment is not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the 'issues presented by the pleadings' need not be tried because they are so patently insubstantial as not to be genuine issues at all. Consequently, as soon as it appears upon such a motion that there is really something to 'try', the judge must at once deny it and let the cause take its course in the usual way. We do not therefore see any greater inconsistency between a trial and a motion for summary judgment in bankruptcy than in an ordinary action. No doubt, a judge must often come near to trying the issues before he can decide whether there are any issues to try, but that is inherent in the whole practice. * * *
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> "Nevertheless, when the statute, § 131, prescribed what facts a petition must allege, it did not mean that the petitioners should be entitled to interlocutory remedies under color of a sham petition. It is as unwarranted an invasion of the debtor's rights to subject it to inquisition upon such a petition, as it is so to subject a defendant in an action. Rule 56 was

intended to give an immediate relief for such wrongs, wherever practiced."

(115 Fed. (2d) 532.)

Applying these principles to the facts in this case, it seems apparent that the judgment of Judge Dawkins on the motion for summary judgment did not deprive the petitioners here of the right to a trial by jury of any issue of fact which the judge would have been required to submit to the jury if there had been a trial. The proof tendered in support of the motion overwhelmingly established the lack of any substantial issue of fact and showed that the respondent was entitled to a summary judgment; and the only contrary proof was an affidavit by the counsel for petitioners, who professed to have become an expert on prices received for gas by those who sold gas in the Richland Field over a period of years because of what he has heard the witnesses say in the course of ten cases involving that issue which were brought and tried by him. As said by Judge Dawkins of a similar affidavit which was filed by the same counsel in the case of Hemler v. Union Producing Company, 40 Fed. Sup. 824 (827):

> "He has offered no sworn opinions by anyone familiar with prices in the Richland Field, such as those tendered by defendant, except that of his counsel, who gained his opinion not by producing or dealing, but by handling lawsuits, and it is evident that this opinion is based upon pipe line contracts and prices which were disclosed at the trial of the first Pardue case and in subsequent trials."

We submit that the first assignment of error of petitioners with its various ramifications is without merit.

The second contention that petitioners make is that the decision of the district court and of the Court of Appeals in this case is contrary to the jurisprudence of Louisiana.

We submit that exactly the reverse of this is true and that the law of Louisiana as interpreted by at least three decisions of its Supreme Court is exactly in accord with the decisions of the district court and the Court of Appeals here.

Under the terms of the lease the petitioners were to be paid for the royalty gas on the basis of "market price." "Market price" in Louisiana means the price which is paid at the well in the field for the oil or gas or other commodity and not the price which it might command at some point outside of the field, no matter how near to the field that point might be. It is not the intrinsic value of the product but what it customarily sells for in the open market at the well in the field where it is produced and where it first comes into the possession of the operator and his lessor. Neither the district court nor the Court of Appeals held, as suggested on page 3 of the petition for the writ of certiorari in this case, that this market price is to be determined by the opinion of experts instead of by sales in the field; on the contrary it was the conclusive proof as to the sales made in the field during the period with which we are here concerned that was responsible for the approval by the Court of Appeals of the summary judgment of the district court.

This is sharply brought home by a comparison of the opinion of the Court of Appeals in this case with its opinion in the companion case of **Hemler v. Union Producing Company, 134 Fed. (2d) 436,** in which the question was as to the market price of gas in the Richland Field for the period beginning with the year 1929 and running through the year 1939. The court held in the Hemler case that the lower court was right in granting the motion for a summary judgment as to the claim for additional royalties on gas produced up to March 20th, 1930 because the evidence showed that there was an actual market at the well in the field and actual sales made at the well in the field at the price established in that market during that period of time; but as to subsequent years the court held that the market in the field had substantially ceased to exist and that the evidence did not establish with the same conclusiveness that there were sales in the field during this subsequent period so as to meet the test of the Louisiana jurisprudence for the establishment of an actual market.

During the first few years of the existence of the Richland Field, as in most other gas fields, many gas producing properties were owned by independent operators—men who acquired leases, drilled wells, produced gas and sold

the gas either to pipe line companies or carbon black companies or other buyers. These independent operators are a restless lot and in practically every case after the flush production is gone they cash in their profits by selling their properties to people who are buying gas from them and turn to other fields. It is then that a market in the field, in the sense in which the Louisiana courts use the term, ceases to exist. Even a slight familiarity with the decisions of the Supreme Court of Louisiana on the point is sufficient for the conviction that the rule adopted here by the district court and by the Court of Appeals is the same as that which prevails in the state courts of Louisiana.

In **Wall v. United Gas Public Service Company, 178 La. 907, 152 So. 561,** the question of the meaning of "market price" as used in an oil and gas lease with relation to the manner in which the lessor should be paid his royalty was squarely presented to the Supreme Court of Louisiana. The decision speaks for itself and we quote the following pertinent portions of it.

> "As to gas, it is provided that the lessees shall pay to the lessor $200 each year for each well producing gas only, until such time as the gas shall be utilized or sold off the premises and that thereafter 'the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the market price per thousand feet, corrected to two pounds above atmospheric pressure.'
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> "The district court * * * held that plaintiffs should be paid on the basis of the price received for the gas where sold, less the expense of conveying it to the market. According to the findings of the trial judge, plaintiffs should have been paid slightly more than 4 cents per thousand cubic feet for the gas.
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> In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the 'market price' thereof. The price to be paid was left open or made to depend upon the 'market price' at the time the gas was produced. The lessee settled with the lessors for the gas at 4 cents per thousand

cubic feet, which it contends was the 'market price' at the well, its theory being that the market price there is the proper basis for the settlement. It admits that it sold the gas at a place two miles from the field at 5.8 cents per thousand cubic feet. The plaintiffs demand settlement on the basis of the sale price of the gas where sold.

"There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term 'market price' meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid. There is where the gas was reduced to possession and there is where ownership of it sprang into existence. The result of bringing the gas to the surface of the ground in the field was to reduce to ownership there a commercial commodity. Previous to the moment the gas reached the surface of the ground, the parties owned nothing so far as the gas was concerned, except the right to explore for it and reduce it to possession and ownership.

* * * *

"The reason why the division and delivery is made at the well, in cases where there is to be a division in kind, is that there is where the parties come into ownership of the commodity, there is where title vests. The lessor and lessee are vested with title to the gas at the well or in the field in the same proportion as the oil is owned. And while there is to be no division of the gas in kind, it is nevertheless contemplated that there shall be a 'division', not of the gas in kind but of its value as fixed by the market price.

"Now if the division in kind, where such is contemplated, should be made at the place where ownership vests, it follows that the division of the value or proceeds of the gas should be made there, provided, of course, that the value of the gas can be determined, and that depends upon whether there is a 'market price' for it in the field.

"The term 'market price' does not mean an arbitrary price fixed by the lessee. 'Market price' means, according to Webster, 'the price actually given in current market dealings.'

* * * *

"As to the price which the lessee was required to pay the lessor as a basis of settlement, the contract here involved stipulates that he should pay one-eighth of the 'value of such gas' calculated at the 'market price', which means the market price at the well or in the field and not the price which it would bring in a distant market.

* * * *

"In the case of Scott v. Steinberger, 113 Kan. 67, 213 P. 646, 647, the Supreme Court of Kansas held that under an oil and gas lease similar to the one in the present case, the contract should be construed to mean that the gas produced 'should be measured and the price determined at the place where the wells were connected with pipe lines, and not at some distant market that might be found at the end of a pipe line remote from the field and where the cost of transportation might equal or exceed the value of the gas produced.' A similar view was expressed by the Kentucky Court of Appeal in the case of Rains v. Oil Company, 200 Ky, 480, 255 S. W. 121.

"To hold that the lessors in this case should receive in settlement one-eighth (or one-sixteenth as they own only one half of the mineral rights) of the gross price received by defendants for the gas, would, in effect, be to hold that it was the duty of the lessees to bear all the expense of carrying the gas to a market beyond the gas field. This would be directly contrary to our holding in the case of Coyle v. La. Gas & Fuel Co., 175 La. 990, 144 So. 737, which case was reaffirmed in Crichton et al. v. Standard Oil Co., 178 La. 57, 150 So. 668 (decided July 7, 1933, and not yet reported)."

(178 La. 910, 911, 912, 913, 914, 915, 916, 917.)

With regard to the ruling of the district judge that the market price should be determined by taking the pipe line price and deducting therefrom the expense of piping the gas to the place where it was delivered, the court said:

"His ruling would unquestionably be correct if as a matter of fact the gas had no 'market value' in the field. But we find as a fact that it did. The testimony shows that there are several gas fields in the northern section of the state, East Texas, and South Arkansas, among them being the Rodessa, Sugar Creek, Cotton Valley, Elm Grove, Shongaloo, Greenwood or Waskom, Richland, and Ouachita-Morehouse.

"It shows further that natural gas has a market value in each of the fields; that pipe lines have been built into each of them; and that the companies purchase gas in each of them at competitive prices. The testimony shows further that 4 cents per thousand cubic feet is the average price paid in these fields and that the price paid plaintiffs was based on that average. In the Elm Grove, Richland, and Ouachita-Morehouse fields, the price is 3 cents, but in some of the others it is 4 cents, and in one it is 5 cents. Therefore the price of 4 cents paid by defendant in this case was not an 'arbitrary price' as suggested by counsel for plaintiffs, but the average price paid in the North Louisiana territory. That is the 'market price' in the fields and must be accepted as the basis of settlement in this case."

(178 La. 918.)

The same question was presented in the case of **Sartor v. United Carbon Company, 183 La. 287, 163 So. 103,** in which the petitioners here were the plaintiffs and were represented by the same counsel. In the cited case suit was filed as here to recover the difference between a royalty paid and what the petitioners claimed should have been paid. The district judge sustained an exception of no cause of action, and the Supreme Court affirmed the action for the following reasons:

"It is conceded that the lessors, under the provisions of the leases which are annexed to and made a part of the petition, were entitled to be paid the royalty of one-eighth of the value of the gas calculated on the market price at the well. The petition alleges that plaintiffs are entitled to the market price at points nearest to the well in Richland parish,

because there were no sales at the well. The petition does not state that there were no sales or market for the gas at the field in question.

"This court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced.

* * * *

"Plaintiffs under the allegations of the petition and terms of the leases may be entitled to the difference between what was paid them and the market price at the well or field where the gas was produced, if such sums be due; but they are not entitled to the general market price of the gas in Richland parish. Harris v. United Gas Public Service Co., 181 La. 983, 160 So. 785. Therefore, the court properly sustained the exception as to the first item."

(183 La. 289, 290.)

The next case and the one in which the issues are substantially identical with those here presented is another suit brought by these same petitioners in the Louisiana court: **Sartor v. United Gas Public Service Company, 186 La. 555, 173 So. 103,** in which it was sought to recover additional gas royalties under a gas royalty clause which, like the one in the present case, provided for the payment of one-eighth of the value of the gas and not less than 3¢ per MCF. The pipe line contracts which were the basis of the averments and arguments set forth in the affidavit of petitioners' counsel filed in response to the motion for summary judgment were all in evidence in the cited case and their contents are recounted at length by the court in its option. The whole decision of the Louisiana Supreme Court in the cited case is so pertinent to the issues here presented that we feel justified in quoting from it at some length.

"Under the mineral lease granted by plaintiffs, they were to be paid as royalty one-eighth of the market value of the gas extracted from their land. Three cents per thousand cubic feet was stipulated as

the minimum value of the gas, but no maximum value was fixed, and it is conceded by defendant that plaintiffs were entitled to royalty payments based upon the market value.

"Where there is no stipulation to the contrary in a lease contract of this kind, 'market value' is understood to mean the current market price paid for gas at the well or in the field where it is produced. Wall v. United Gas Public Service Company, 178 La. 908, 152 So. 561; Sartor v. United Carbon Company, 183 La. 287, 163 So. 103, 104.

"Plaintiffs' land is in what is known as the 'Richland field', and in order to prove the 'market value' of natural gas in that field they filed in evidence eight documents marked for identification as P-5 to P-13, inclusive. These documents are contracts entered into by large corporations engaged in the business of producing and selling natural gas in the various gas fields of North Louisiana, with pipe-line companies, which are engaged in the transportation to and sale of gas at the town borders of various towns and cities in several states. They all relate to the sale of gas produced in the Richland and Ouachita fields and show the prices paid to producers by the pipe-line companies.

"Plaintiffs offer no other testimony to sustain their allegations that the market value of gas in the Richland field exceeds 3 cents, the price they were paid by the defendant. These contracts, except Exhibits 6 and 7, show that the minimum price at which the producers agreed to sell gas to the pipe-line companies during the years 1930, 1931, and 1932 exceeded 3 cents. In each of the contracts except two, the prices agreed upon ranged from 4½ cents for the first three years, to 8½ cents for the last years of the periods over which the contracts run; these periods being ten years in some and fifteen years in other cases.

"These contracts show that the pipe lines owned by the purchasers of the gas extended into the fields where the gas is produced and that the producers obligated themselves to deliver the gas into the pipe lines at one specified point in each of the gas fields.

"It is argued on behalf of the plaintiffs that the prices received by the producers from the pipe-line companies should be accepted as the 'market value' of the gas in the field, as that term is used in the lease contract. The trial judge was not impressed with this argument. Neither are we.

"The testimony shows that there are two large gas fields in North Louisiana, one known as the 'Richland field' and the other as the 'Ouachita field.' The Richland field comprises an area within the parish of Richland, where the record shows that innumerable oil and gas leases have been granted by landowners. This field has been extensively developed and is, or was at one time, one of the greatest gas-producing areas in the South. Just how many gas-producing wells there are in this field is not shown. The Ouachita field is much larger in area, comprising parts of the parishes of Ouachita, Morehouse, and Union. This field is also highly developed, there being therein literally hundreds of producing wells.

"These two fields, comprising parts of the four parishes, Richland, Ouachita, Morehouse, and Union, all grouped together in the extreme northern portion of this state, taken together embrace within their limits territory which is said to be one of the largest, if not the largest, natural gas-producing areas of the entire country. For several years there has been produced and is yet being produced in these fields vastly more natural gas than can be disposed of and consumed in local markets, the result being that a market for the gas has been sought in regions far beyond the borders of this state. There is testimony in the record showing that gas from these fields is piped as far north as St. Louis and as far east as Atlanta. Millions of dollars have been spent in the construction of pipe lines to convey the gas to foreign markets. The corporations which built these pipe lines make contracts for the sale of gas to consumers in the territory adjacent to and at the ends of the lines, and in order to comply with their contracts, they in turn contract with producers to furnish the gas delivered into their pipe lines. The contracts between the producers and the pipe-line companies

run over periods of ten to fifteen years, the producers being obligated to furnish such amounts of gas as the pipe-line companies may demand, usually within minimum and maximum limits.

"In order to supply the gas, the producers must maintain, at enormous expense what are known as 'gathering systems', which involve every expense from the purchasing of the leases to the laying of the lines to convey the gas from the wells to the pipe lines, the cost of meters to be installed at the pipe lines where the gas is delivered, the expense of their installation, the cost of keeping a clerical force to read the meters, calculate the amount of gas delivered, keep books, and make monthly reports to the purchasers.

"We have read all the contracts introduced and find that as relates to the obligations assumed by the producers, they are almost identical, about the only difference being as to the minimum and maximum amounts of gas to be delivered. In sum, here is what the producers obligated themselves to do:

"First, to deliver a specified 'annual minimum' amount of gas to the buyer and be prepared to deliver up to twice this amount upon the demand of the buyer. The annual minimum is subject to upward revisions as specified in the contract, the buyer being at all times entitled to demand a maximum amounting to twice the agreed minimum.

"Second, if deliveries for any reason fall below the amount agreed upon, the producer has a specified number of days in which to take steps to correct the deficiency and a specified number of days in which to resume delivery of the full amount. If the deficiency remain uncorrected after the specified number of days, the buyer is not obligated to take the full amount contracted for; and at the expiration of two years, the deficiency persisting, the buyer may cancel the contract.

"Third, to deliver all gas to two receiving stations, one in the Ouachita field and one in the Richland field. The producer or seller must provide and maintain

meters, pressure gauges, and other equipment for measuring and recording the amount of gas delivered, and keep accounts and render monthly statements to the buyer.

"Fourth, seller must warrant title to all gas it delivers and must indemnify the buyer in case of judgments arising out of title or royalty litigation. It must pay production and severance taxes.

"By thus binding themselves under these contracts, the producers or vendors of the gas take all the risks and assume heavy burdens. They are required to make contracts extending over long periods of time, which involve the hazard or gamble that the wells and the territory then producing gas will continue to produce until the end of the term, which the testimony shows is always uncertain. If the wells for any reason cease to produce, and many wells do, according to the testimony, the producers must drill others. They are required by the pipe-line companies, the purchasers, to deliver during each year a minimum amount of gas, and at the option of the purchasers, double that amount. The producers have no way of knowing what amount of gas the purchasers will demand above the minimum stipulated in the contract, and for that reason it is necessary for them to stand ready at all times to deliver not only the minimum, but the maximum if called upon to do so.

"There is a wide range or margin between the minimum and the maximum amounts stated in the contracts. So that the producers, in order to be able during the life of the contracts to comply with their obligations to supply the maximum if the demand is made upon them, are compelled, in effect, to hold in reserve vast quantities of gas which may never be demanded. By that we mean that it is necessary for the producers to be prepared to deliver, not only the amount of gas which the purchasers are required under the contracts to take, but such additional amount up to the maximum as the purchasers may at their option demand. They must make preparations to deliver gas which may never be called for.

"The drastic 'stand-by' requirement in these contracts adds greatly to the expense of carrying them out. The testimony shows that the guaranty on the part of the producers to deliver, on demand, large quantities of gas above the minimum, formed part of the consideration for the prices paid by the pipe-line companies.

"We have said that the pipe lines extended into the Richland field. By that we do not mean that they were laid up to or even near to each of the wells in the field. The so-called 'field' extends over a wide area with wells in every part of it. The pipe lines extend to a point in or near each of the fields where there are installed receiving or delivery stations. The purchasers pay for no gas except that which is delivered.

"These plaintiffs assumed no responsibility, guaranteed nothing, took no risks, and shared none of the expense of gathering and delivering the gas to the purchasers.

"Plaintiffs' theory that these pipe-line prices should be accepted as the basis for settlement with them is unsound. Under their contract they are entitled to payment for their royalty interest in the gas based upon the 'market value' at the place where it is reduced to possession and ownership, where title vests, which is at the well, not at some distant point in the 'field' or elsewhere, to which it is transported for sale and delivery to the pipe lines. This was made clear in the case of Wall v. United Gas Public Service Company, supra.

* * * *

"In the case presently under consideration, the testimony shows that natural gas has a 'market value' at the wells of 3 cents per thousand cubic feet. The defendant called numerous witnesses, all engaged in the business of producing and selling natural gas in the Ouachita and Richland fields. These witnesses without exception testified that the market value of gas at the wells in the field was 3 cents. In addition, defendant offered in evidence numerous contracts

showing the sale of gas in the field at 3 cents. Innumerable lease contracts (said to be about 900; we did not count them) were introduced in evidence, practically all of them showing that the lessors were to be paid royalties based upon the value of the gas at 3 cents per thousand cubic feet.

"A detailed review of the testimony introduced by defendant to show the market value of the gas at the wells in these fields would serve no useful purpose. It suffices to say that defendant proved conclusively that the market price in these fields does not exceed 3 cents per thousand cubic feet.

"As we have already stated, plaintiff offered no testimony as to the value of gas except that stipulated in the so-called pipe-line contracts. Having rejected the theory that the prices stated in these contracts should be accepted as a basis for settlements with these royalty owners, we must rely upon the testimony introduced by defendant to show the market value of gas at the wells or in the fields where it is produced."

(186 La. 559 to 569, incl.)

These decisions clearly show the perfect agreement between the Louisiana Supreme Court and the United States Circuit Court of Appeals for the Fifth Circuit in regard to what is the meaning of the words "market price" or "market value" or "value" in an oil and gas lease such as that upon which the claim of the petitioners here is based.

CONCLUSION

It is respectfully submitted

that the evidence supporting the motion for summary judgment showed positively and definitely and beyond reasonable doubt that there was during the period with which this case is concerned a market for gas at the well in the Richland Field and that the price uniformly paid for gas in that market was 3¢ per MCF;

that the only opposing evidence offered by petitioners was the affidavit of their counsel, which showed

that he was not competent to testify as an expert and disclosed his testimony, as embodied in the affidavit, either to be not based on his personal knowledge (and therefore hearsay and inadmissible) or to relate to prices paid for gas under long term pipe line contracts which were themselves for reasons heretofore stated inadmissible;

that Rule 56 of the Federal Rules of Civil Procedure is a salutary and constitutional means for summarily disposing of cases where the issues of fact tendered by the pleadings are either insubstantial or fictitious and that the present suit is exactly the kind of case to which the rule was intended to apply.

From this it follows that the judgment of the district court and the Court of Appeals was correct and should be affirmed.

Respectfully submitted.

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